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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 113

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

PACIFIC COAST WHOLESALERS' ASSOCIATION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the district court for the Southern District of California (R. 49) is reported in 81 F. Supp. 991. The reports of the Interstate Commerce Commission (R. 12, 23) appear in 264 I.C.C. 134 and 269 I.C.C. 504.

JURISDICTION

The final decree of the three-judge district court was entered on February 18, 1949 (R. 61). The petition for appeal was presented and allowed on

April 12, 1949 (R. 63, 66). The jurisdiction of this Court is conferred by 28 U.S.C. 1253, 2101(b), and 2325. Probable jurisdiction was noted on October 10, 1949 (R. 772).

QUESTIONS PRESENTED

The Pacific Coast Wholesalers' Association undertakes to provide transportation of any and all goods consigned by eastern suppliers to the Association's members or their customers in western areas, and has provided such transportation for over 38 million pounds of goods per year. In the case of goods shipped on a "delivered price" or "f.o.b. destination" basis the freight charges collected from the suppliers are in excess of the costs to the Association in providing the transportation, and the net proceeds thus acquired are passed on by the Association to its members. The questions presented are:

1. Whether the Commission acted without rational basis in concluding that in providing transportation of goods for suppliers of its members at rates greater than cost, the Association's operations are not on a "nonprofit" basis within the meaning of Section 402(c) of the Interstate Commerce Act.

2. Whether the Interstate Commerce Commission acted without rational basis in concluding that the Association "holds itself out to the general public" to provide transportation of property, or a class or classes of property, within the meaning of Section 402(a)(5) of the Interstate Commerce Act.

STATUTE INVOLVED

Section 402 of Part IV of the Interstate Commerce Act, 56 Stat. 284, 49 U. S. C. 1002, provides in part:

(a) For the purposes of this part—

* * * * *

(5) The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

* * * * *

(7) The term "service subject to this part" means any or all of the service in connection with the transportation in interstate

commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this part to perform or provide;

* * * * *

(b) The provisions of this part shall not apply (1) to service performed by or under the direction of a cooperative association, as defined in the Agricultural Marketing Act, approved June 15, 1929, as amended, or by a federation of such cooperative associations, if such federation possesses no greater powers or purposes than cooperative associations so defined, or (2) where the property with respect to which service is performed consists of ordinary livestock, fish (including shellfish), agricultural commodities (not including manufactured products thereof), or used household goods, if the person performing such service engages in service subject to this part with respect to not more than one of the classifications of property above specified.

(c) The provisions of this part shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and

responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed.

Section 403, 49 U. S. C. 1003, provides in part:

(a) It shall be the duty of the Commission to administer the provisions of this part, and to that end it shall have the authority to make and amend such rules and regulations and to issue such orders as may be necessary to carry out its provisions.

* * * * *

(f) The Commission may investigate, either upon complaint or upon its own initiative, whether any freight forwarder has failed to comply with any provision of this part or with any order, rule, regulation, or requirement issued or established pursuant thereto, and, after notice and hearing, take appropriate action to compel compliance therewith. Whenever the Commission is of opinion that any complaint does not state reasonable grounds for action on its part, it may dismiss such complaint.

Section 410, 49 U. S. C. 1010, provides in part:

(a) No person shall engage in service subject to this part unless such person holds a permit, issued by the Commission, authorizing such service; * * *

STATEMENT

The proceedings culminating in the present appeal commenced in 1944 with an investigation by

the Interstate Commerce Commission to determine whether appellee Pacific Coast Wholesalers' Association [1] was conducting freight forwarding operations in a manner violative of Part IV of the Interstate Commerce Act, 56 Stat. 284, 49 U. S. C. 1001 *et seq.* (R. 13). After hearings, the Commission (Division 4) determined that on the evidence then before it no violations had been shown, and in November, 1945, the proceeding was ordered discontinued (R. 13, 22-23). Thereafter, upon petition of Freight Forwarders Institute (appellant in No. 114), the proceeding was reopened for further hearings, and additional evidence was received (R. 25). In December, 1947, the Commission (Division 4) issued a further report in which it was determined that the freight operations revealed by the additional evidence constituted appellee Pacific Coast Wholesalers' Association a freight forwarder within the statutory definition as to a certain portion of its operations, and that the conduct of those operations without a permit from the Commission was a violation of Section 410(a) of the Act (R. 23). The Commission ordered appellees to discontinue the operations found to be unlawful (R. 36).

Appellees then brought the present action against the United States to have the Commission's order set aside, and appellants Interstate Commerce Commission and Freight Forwarders Insti-

[1] The other appellees are individuals who constitute the board of directors and principal officers of the Association.

tute intervened (R. 1, 38, 39). The instant appeal was taken by the United States and Interstate Commerce Commission from the decree of a three-judge district court (R. 61) setting aside and enjoining enforcement of the Commission's order based upon the court's opinion that the order was without "rational basis" (R. 56).[2]

The issue here presented is whether, on the findings of fact made by the Commission,[3] there was a rational basis for its conclusion that the activities of appellees with respect to goods sold f.o.b. destination are those of a freight forwarder within the meaning of Section 402 of the Interstate Commerce Act (*supra*, p. 3). The pertinent facts may be briefly stated.

Appellee Pacific Coast Wholesalers' Association was formed in 1935 by a group of seven automotive parts dealers in Los Angeles, California, as a voluntary, unincorporated, nonprofit association to provide a means of assembling, consolidating, forwarding and distributing freight for its members with the benefits of carload, truckload, or other volume rates. The constitution and by-laws of the Association at that time limited membership to business organizations operating in any of seven western states whose volume of sales at wholesale exceed 75% of their entire sales. (R. 13-14.)

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[2] The appeal of Freight Forwarders Institute (No. 114) has been consolidated with the present case for oral argument.

[3] The court below not only accepted the Commission's determinations of fact but specifically found them to be supported by substantial evidence (R. 54).

In 1943, after the enactment of Part IV of the Interstate Commerce Act providing for regulation of freight forwarders, the Association was incorporated as a California corporation (R. 14). The restriction on membership was liberalized so as to permit admittance not only of "persons, firms, or corporations engaged in business as wholesalers," but of those "in such other business or activity as may be approved by the board of directors [within named states]." Membership was limited to 50, but this limitation was made subject to alteration by an amendment to the by-laws approved by a majority of the directors. (Comm. Ex. 1, not printed.[3a] By 1945 the Association had grown to 41 members,[4] and that year it consolidated 54,412 less-than-carload shipments aggregating 38,033,341 pounds and issued freight bills amounting to $1,195,831.71 (R. 28). The Association's members were principally wholesalers of hardware and automotive supplies but they included a shipbuilding company, a mine and smelter supply company, a marine supply company, and a bridge and dredging company (Comm. Ex. 22, p. 22, not printed).

[3a] The parties have stipulated (R. 767) that all exhibits may be referred to whether or not included in the printed record.

[4] As of February, 1947 the membership was 38. The members have their main offices in major cities in California, Colorado, Michigan, Minnesota, Oregon, Washington, Utah, and Wisconsin, with branch stores in some of those states, and in Arizona, Montana, Idaho, Alaska, and Yukon Territory. Each member serves from 1 to 35 towns or cities in the above States and territories, and in Nevada, Wyoming, British Columbia, and Hawaii. (R. 25.)

The Association has never applied to the Commission for the permit to operate required for freight forwarders by Section 410(a) of the Act (*supra*, p. 5) (R. 15).

The Association handles freight physically in the same manner as do regular freight forwarders.[5] In respect of the operations here at issue—shipments f. o. b. destination or on a delivered price basis—the freight charges are borne by the suppliers, and the Association charges the suppliers the same rates for its freight handling as those charged by ordinary freight forwarders. It thus receives the benefit of the difference between the freight forwarder rates and the carload or truckload rates which it pays to the underlying carriers. In short the Association reaps the same economic benefit from its activities as is received by a commercial forwarder from similar operations.[6] The

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[5] As counsel for appellees unequivocally put it in the hearings before the Commission (R. 383):

> * * * the physical handling of this freight, if the Examiner please, by the P. C. W. A. or by Mr. Olson on behalf of the P. C. W. A. is exactly the same as the physical handling and the consolidation of the shipments and the forwarding of the shipments by a freight forwarder * * *.

[6] The economic basis of the freight forwarder business has been aptly described by this Court as follows:

"Freight forwarders consolidate less-than-carload freight into carloads for shipment by rail, truck, or water. Their charges approximate rail less-than-carload rates; their expenses and profits are derived from the spread between the carload and l.c.l. rates." *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465, 467.

economic gain[7] derived from the Association's freight operation is not, however, retained by the Association itself, but is passed on to its members in the form of "freight savings" or "refunds", which, in the words of the Commission amount to:

> the differences between the charges at the less-than-carload or less-than-truckload forwarder rate from origin to destination, plus 3 percent thereof, on the one hand, and the cost to the association of assembling, consolidating, transporting, and distributing the freight, including the inbound charges to Chicago, the terminal expenses at that point, carload charges from Chicago to destination or break-bulk points, terminal and distributing costs, and transportation taxes, plus additional items charged by the association of 13 cents for ad-

[7] The magnitude of this gain is reflected in the following table:

Year	Tonnage Handled Pounds	Revenue	Expenses	"Savings"
1942	19,650,654	$ 591,198.91	$ 527,388.95	$ 60,522.15
1943	44,070,867	1,349,150.73	1,181,721.84	157,125 28
1944	42,018,232	1,342,880.49	1,184,997.29	136,138.32[1]
1945	38,033,341	1,195,831.71	1,076,892.33	118,939.38

[1] Not complete.

The 1945 "savings" represent an average of 31.29 cents per hundred pounds or 9.94 percent of the total amount of the freight bills issued. The operations here involved—i.e. delivered price or f.o.b. destination transactions—are generally handled either on a "prepaid" or "freight allowed" basis. In other words the consignor-supplier either prepays the freight charges, or they are deducted by the member consignee from the invoice price of the goods. Of the 1945 savings the Commission estimated that approximately $11,894 represented savings on prepaid charges. The Commission also found that there was a substantial, although unascertained, "saving" on freight allowances. (R. 17, 28, 29.)

ministration, 2.25 cents for billing and mailing arrival notices, and 1.125 for insurance, on the other hand. [R. 27-28.]

The operations of the Association are conducted by appellee Olson, who has the title of General Manager, but whose activities closely resemble those of an independent contractor. Olson receives a fee or commission of 13 cents per 100 lbs. on all freight handled by the Association. He pays his own administrative expenses. He exercises extensive control over the Association's business and dominates its shipping activities. He is also a principal stockholder in the Transport Terminal Company which acts as the Association's agent in Chicago, where the Association's shipments are received from the East, consolidated and forwarded to western break-bulk points. (R. 17-18, 20-21.)

The substantial freight business of the Association is not obtained by direct solicitation by its officers or employees. The members simply direct or request their suppliers to use the Association's facilities. The suppliers are instructed to consign their shipments from eastern origins to the Association's agent at Chicago, which consolidates the shipments in carloads for movement by rail thence to break-bulk points (R. 25).

The particular operations found by the Commission to constitute the Association a freight forwarder under the statutory definitions involve the handling of goods sold to the members on a deliv-

ered price or f.o.b destination basis.[8] In this type of transaction the supplier pays for the transportation. Consequently, the members of the Association benefit to the extent of the difference between the rates which the suppliers are compelled to pay and the reduced rates which are paid by the Association to the underlying carriers. At the present time the Association limits itself to freight consigned to its members or their customers, but as recently as 1944 and 1945 it handled substantial quantities of freight consigned to a nonmember—the United States Maritime Commission—and passed on to it the "savings" of $24,201.97 thereby earned (R. 25-26).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that the Pacific Coast Wholesalers' Association operates on a nonprofit basis in assembling, consolidating, forwarding and distributing freight shipped to its members or their customers by non-members of the Association on an "f.o.b. destination" or "delivered price" basis.

2. In holding that in the conduct of the above-described operations the Association does not hold

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[8] The operations of the appellees involving goods shipped to the members of the Association f.o.b. *origin* (i.e. the freight costs to be borne by the member-purchaser) have been determined not to constitute freight forwarding (R. 12-22), and are not at issue here. Such operations represent the major portion of the Association's business. See note 7, *supra*, p. 10.

itself out to the general public to provide transportation of property for compensation.

3. In entering a decree setting aside and enjoining enforcement of the order of the Interstate Commerce Commission requiring appellees to discontinue the portion of their operations found to be unlawful.

SUMMARY OF ARGUMENT

I

Section 402(c) of the Interstate Commerce Act declares the provisions for the regulation of freight forwarders inapplicable to associations of shippers consolidating freight for their members on a non-profit basis in order to secure the benefits of volume rates. The Interstate Commerce Commission correctly determined that appellee Pacific Coast Wholesalers Association is not within the protection of Section 402(c) in handling freight consigned to its members and their customers on an f.o.b. destination or delivered price basis. By charging the seller the full forwarder's "less than carload" rate, and shipping the freight in carload lots, the Association makes precisely the same profit which is made by a conventional freight forwarder. If the revenue so obtained were refunded to the sellers, who bear the freight charges, it would be a freight saving to the shippers. But the revenue here is paid to the Association's members, who do not pay the freight charges and to whom it is a clear profit.

Even if it could be reasonably concluded that

the Association does not operate on a profit basis in handling the freight of others to its economic benefit, the construction by the Commission of the law which it administers should not have been set aside, since it had warrant in the record and a reasonable basis in law.

II

The Commission correctly determined that appellee Association holds itself out to serve the general public within the meaning of Section 402(a)(5) of the Interstate Commerce Act and is, therefore, subject to regulation as a freight forwarder. The Association serves all the suppliers of its members and handles a volume of 38 million pounds a year. Nobody serves all the public, and it is sufficient if one serves an appreciable segment of the public and stands ready to serve all who fall within a particular class or classes.

III

In acting as a freight forwarder without a permit the Association has been violating Section 410 of the Interstate Commerce Act. The Interstate Commerce Commission properly ordered it to discontinue the activities which constitute it a freight forwarder.

ARGUMENT

Introduction

This case presents for the first time the question as to the scope of the term "freight forwarder",

within the meaning of Part IV of the Interstate Commerce Act, which was added to the Act in 1942, and which provides for regulation of the forwarder industry.[9] The Commission is given general powers to regulate the rates and practices of freight forwarders similar to those it possesses in respect of rail, motor and water carriers under Parts I, II, and III of the Act respectively.[10] The Commission has the duty to administer Part IV (Section 403(a), *supra*, p. 5) and the power to investigate whether any freight forwarder has violated it (Section 403(f), *supra*, p. 5). Although a permit from the Commission to operate as a freight forwarder is required (Section 410), the Commission is not empowered to deny such a permit solely on the ground that the proposed service will be in competition with existing freight forwarders. (Section 410(d)). The Commission may prescribe just and reasonable rates (Section 406). Freight forwarders may not discriminate among shippers (Section 404); they must file tariffs and adhere to the rates there published (Section 405); a freight forwarder may not, with certain exceptions, be controlled by or control a carrier or person who utilizes services of freight forwarders in his business (Sec-

[9] The status of a freight forwarder as a shipper or common carrier was considered at the last term of the Court in *Chicago, Milwaukee, St. Paul & Pacific R. Co.* v. *Acme Fast Freight, Inc.*, 336 U.S. 465.

[10] For a section by section description of the bill substantially in the form which became Part IV, see H. Rep. 1172, 77th Cong., 1st. Sess.

tion 411); and he may be required to submit various reports (Section 412).

"Freight forwarder" is defined generally to include one who transports or provides transportation in commerce (other than carriers under Parts I, II, and III) for compensation, provided (1) that he holds himself out to the general public to provide transportation services, (2) that he provides for the assembling and concentrating operations and the break-bulk and distributing operations in the through movement of property, (3) that he assumes responsibility for the transportation and safety of the property from point of receipt to point of destination and (4) that he utilizes the services of carriers regulated under Parts I, II, and III of the Act (Section 402(a) (5)). There are certain exemptions relating to agricultural cooperatives, and specifically named commodities (Section 402(b), *supra,* p. 4), and there is a "clarifying" provision (*ibid*) which states that Part IV shall not be construed to apply to shippers or shippers' associations pooling freight on a nonprofit basis, or to warehousemen whose services and responsibilities to shippers are confined to the terminal area in which the services are performed.

The order of the Interstate Commerce Commission which the court below has set aside required appellee Pacific Coast Wholesalers' Association to discontinue certain freight operations found to

constitute freight forwarding under Part IV of the Interstate Commerce Act, and thus to be unlawful in the absence of a permit from the Commission. Although the court below explicitly accepted the Commission's findings of fact, it rejected the conclusion that the Association has been acting as a freight forwarder on the grounds (1) that the revenue derived by the Association from the freight operations in question does not, as a matter of law, constitute profit to the Association within the meaning of Section 402(c), and (2) that the Association has not, as a matter of law, held itself out to the general public to provide transportation of property for compensation within the meaning of Section 402(a) (5). It is conceded that in all other respects the activities of the Association here involved constitute freight forwarding subject to regulation.

I

The Pacific Coast Wholesales' Association Operates on a Profit Basis in Providing, for the Suppliers of Its Members, Transportation of Goods Which Are Sold by the Suppliers on an F.O.B. Destination or Delivered Price Basis

Section 402(c) of the Act (49 U. S. C. 1002(c)) provides:

> The provisions of this part shall not be construed to apply (1) *to the operations of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the*

> *benefits of carload, truckload, or other volume rates,* or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed. [Emphasis supplied.]

The court below concluded that the appellee Association is exempted from regulation as a freight forwarder under the italicized portion of the above provision. To reach that result the court had to conclude, and did conclude, that the Association acts on a "nonprofit basis" in carrying freight for the suppliers of its members at rates yielding a substantial net return (Concl. 4, R. 60).

In making this finding the court seems to have misconceived the nature of an f.o.b. *destination* or delivered price transaction. In such a transaction, by definition, the seller, not the buyer, pays the freight, whereas in an f.o.b. *origin* sale, the freight charge is borne by the buyer. See 2 *Williston on Sales* (Rev. ed. 1948) § 280b. The Commission specifically found that the transactions here in question were "f.o.b. destination" or "delivered-price" (R. 35-36) and premised its decision on that fact: [11]

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[11] This Court has repeatedly recognized that this is the correct interpretation of an f.o.b. destination contract. *Southern Pacific Co.* v. *Darnell-Taenzer Lbr. Co.*, 245 U.S. 531; *Louisville & N. R. R.* v. *Sloss-Sheffield Steel and Iron Co.*, 269 U.S. 217, 235.

> Simple logic would dictate the conclusion that in handling shipments on which freight is borne by nonmember-consignors, the association is operating for hire and therefore for profit. [R. 32.]

At one point in its opinion, the court below conceded that " 'where goods are f.o.b. destination, it is ordinarily the seller who bears the freight' " (R. 55), and it explicitly accepted the Commission's findings of fact as supported by substantial evidence (R. 54). Yet the opinion quite clearly proceeds on the assumption, contrary to the fact, that the transportation costs here are borne by the *member-consignees.* The court states that "the purpose and the result of the transaction is not to benefit the shipper, but to reduce transportation costs *to the member* through savings effected in cooperation with other members * * *" (emphasis supplied) (R. 56). As a consequence of this initial error the court never came to grips with the legal issue presented, namely, whether forwarding operations of the Association which are initially conducted on a profit basis are somehow rendered "nonprofit" merely because the revenue derived from them is passed on to the consignees of the freight. The court therefore failed to analyze the Commission's reasons for its decision.[12]

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[12] The court concluded that the Association acts as agent for its members in handling freight of their suppliers, and that consequently there "is no profit to the association" (R. 56). On the court's assumption that the members pay

The Commission considered the word "non-profit" in its statutory setting. It noted that the concept of operations on a profit basis is placed in contradistinction to the operations of shippers' associations in pooling freight to obtain for their members the benefit of volume rates—*i.e.*, a freight saving. The Commission said:

> The meaning of the word "profit" varies with its context. Broadly stated, it is the excess of what is obtained over the cost of obtaining it. In the sense that they result in savings to its members, all of the association's operations are for profit. * * * But section 402(c) (1) specifically sanctions an association's obtaining for its members "the benefits [savings] of carload * * * rates"; and if the association's operations were confined to obtaining for its members the benefits of carload rates on their own freight, such operations would appear to be excluded from the concept of profit as the word "non-profit" is used in that section. [R. 32.]

Consistent with this position the Commission held that in the case of f.o.b. *origin* shipments the Association's revenue could truly be deemed freight savings to the member-consignees since they bear the freight costs (R. 12-22). But as to the f.o.b.

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the freight, this fact would show that the revenue of the Association is passed on as freight savings to the members. But, since the members do not pay the freight, it is evident that the money received by them cannot by any stretch of imagination be thought to constitute freight savings.

destination shipments involved in this appeal the Commission found, and we submit that it had no alternative but to find, that the net revenue of the Association is nothing more nor less than profit from forwarding the freight of others.

The crucial question is whether the consolidation activities of the Association have the purpose and effect of saving freight costs for the Association's members or the purpose and effect of making a profit on providing transportation of suppliers' freight. If the reductions in freight charges resulting from the activities of the Association redounded to the benefit of the persons who have to pay such charges, there would be a true freight "saving"; but when these sums go into the pockets of persons who in substance are sellers rather than buyers of the transportation in question, and who would not in any case have to pay freight charges, they can be regarded only as profits. Since that is the case here, it makes no difference whether the Association retains the profits from its forwarding business or passes them on to its members. Profits are profits whether retained in a business or paid out to its owners.

Appellees would presumably concede that if the Association made a practice of providing, at its present rates,[13] transportation of goods which were

[13] It is of course clear that if the Association performed its services at cost, thus passing on a freight saving to the supplier-consignors, its operations would be on a nonprofit basis. In a similar case involving f.o.b. origin sales where a

not consigned to or from its members or their customers, the Association would be a freight forwarder even if it passed on its profits to its members. Under such circumstances the Association's members would not be "shippers", and the Association would clearly be operating on a profit basis. That the Association's customers are in fact its members' suppliers and that the members, rather than the Association, solicit the business, are no doubt highly important as furnishing an inducement to the suppliers to patronize the Association as a courtesy to the members. But these facts are quite irrelevant to the question whether the Association is operating on a profit basis.[14]

Not only is the Commission's construction consonant with the plain language of Section 402(c) as has been demonstrated above, but it is a proper implementation of the Commission's function of administering the Act (Section 403(a), *supra*, p. 5) in the manner best calculated to carry out the National Transportation Policy "to provide for fair and impartial regulation of all modes of

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producers' association consolidated freight for its customers and collected from them *less* than its actual costs, the association was found by the Commission not to be acting as a freight forwarder. *The Barre Granite Association, Inc., Freight Forwarder Application* (No. FF-193, decided November 3, 1949). *Cf. Interstate Commerce Commission* v. *Jamestown Sterling Corp.*, 64 F. Supp. 121, 123 (W.D. N.Y.).

[14] Nor, in the present case, can the members be regarded as "shippers". In the normal commercial sense, and as used in Section 402(c) of the Act, the term can refer only to the persons who consign the goods or the persons who bear the freight costs. The members do neither here.

transportation subject to the provisions" of the Act (Preamble). Cf. *A. W. Stickle & Co.* v. *Interstate Commerce Commission,* 128 F. 2d 155, 159 (C. A. 10). The effect of the construction of Section 402(c) sought by the appellees would be to carve an exemption from the category of freight forwarders which would seriously weaken the scheme of regulation embodied in Part IV of the Act. For the ordinary freight forwarder must submit to the burdens of regulation, cannot give rebates on its published rates, and would be required to obtain the Commission's permission to be owned by shippers who use freight forwarders (Section 411, 49 U.S.C. 1011). For it to compete with an association which is not subject to regulation and which has virtually a captive clientele in the suppliers of its members is, to say the least, difficult.

The appellees' interpretation of Section 402(c) finds no support in the legislative history. Section 402(c) was introduced by the House Committee on Interstate and Foreign Commerce into the bill (S. 210, 77th Cong., 1st Sess.) which became Part IV of the Interstate Commerce Act. It was intended as "a clarifying provision rather than an exemption" from the definition of freight forwarder embodied in Section 402(a) (5) (H. Rep. No. 1172, 77th Cong., 1st Sess., p. 7).[15] It was designed

[15] The statutory language "shall not be construed to apply" in Section 402(c) also clearly shows that Section 402(c) was intended as a rule of construction and not an exemption. When a true exemption was created (Section 402(b), *supra,*

to assure that shippers pooling their freight directly or through an association would not be classified as forwarders, but there is no indication that it was intended, contrary to its language, to apply to the activities of shippers, or an association of shippers, in carrying freight for others at a profit.[16]

For the reasons above stated it is apparent that the Commission's determination in the instant case that appellee Association has been operating on a profit basis was a reasonable construction of the statute. It is settled law that the Commission's interpretations of the Act which it administers are entitled to great weight, since they involve " 'con-

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p. 4) Congress carefully used the appropriate words "shall not apply" instead of "shall not be construed to apply". Cf. *Ownership of Stock in Freight Forwarders*, 265 I.C.C. 73, 75, construing the similar language of Section 411(g) (49 U.S.C. 1011).

[16] It is significant that Section 402(c) was described as relating to operations on a nonprofit basis not only in the report of the Committee which added the section to the bill (H. Rep. No. 1172, 77th Cong., 1st Sess., p. 6) but on the floor of the House by the Chairman (Congressman Lea) and the ranking minority member (Congressman Wolverton) of that Committee. Congressman Lea stated (87 Cong. Rec. 8212):

> Then in subdivision (c) of the same section, it is specifically stated that the bill does not apply to operations of shippers in consolidating or distributing freight for themselves on a nonprofit basis for the purpose of securing the benefits of carload, truckload, or other volume rates.

And Congressman Wolverton stated (87 Cong. Rec. 8217):

> As explained * * * [in the report] with respect to paragraph (c) of the same section, the regulation will not apply to the operations of a group or association of shippers in consolidating or distributing freight for the members thereof on a nonprofit basis.

temporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, 549. The language of the court in *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, although dealing with a different administrative agency, is directly apposite here. That case turned on the question whether a newsboy was an "employee" as that term was used in the National Labor Relations Act, 49 Stat. 449, as amended, 29 U. S. C. 151 *et seq.* This Court said (pp. 130-131):

> Undoubtedly questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 294; *United States* v. *American Trucking Assns.*, 310 U. S. 534. But where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited. Like the commissioner's determination under the Longshoremen's & Harbor Workers' Act, that a man is not a "member of a crew" (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251) or that he

> was injured "in the course of employment" (*Parker* v. *Motor Boat Sales,* 314 U. S. 244) and the Federal Communications Commission's determination that one company is under the "control" of another (*Rochester Telephone Corp.* v. *United States,* 307 U. S. 125), the Board's determination that specified persons are "employees" under this Act is to be accepted if it has "warrant in the record" and a reasonable basis in law.

And see *Levinson* v. *Spector Motor Co.,* 330 U. S. 649, 672.

The determination of the Interstate Commerce Commission that appellee Association has not been operating on a nonprofit basis most certainly had warrant in the record and "a reasonable basis in law".

II

The Association Operates as a Freight Forwarder Within the Meaning of Section 402(a) (5) of the Interstate Commerce Act

Section 402(a) (5) of the Act (49 U. S. C. 1002(a) (5)) provides:

> The term "freight forwarder" means any person which (otherwise than as a carrier subject to part I, II, or III of this Act) holds itself out to the general public to transport or provide transportation of property, or any class or classes of property, for compensation, in interstate commerce, and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for

> assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) assumes responsibility for the transportation of such property from point of receipt to point of destination, and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to part I, II, or III of this Act.

It is undisputed that activities of the Pacific Coast Wholesalers' Association satisfy the requirements of subdivisions (A), (B), and (C) in the above definition. The Association in the ordinary and usual course of its undertaking provides for assembling and consolidating shipments in Chicago and for break-bulk and distributing operations in the destination areas in the West (R. 15-18, 34). It assumes responsibility for the transportation of such property from point of receipt to point of destination, and it utilizes the services of rail and motor carriers subject to Parts I and II of the Act (R. 35). There is, however, a dispute as to whether in providing such services the Association "holds itself out to the general public."

The Commission found as a fact that

> the association serves 38 wholesalers, principally of hardware and automotive supplies, located at the principal cities in Pacific coast and intermountain territory. As will be seen

> from the tonnage figures set forth above, in serving the wholesalers and their eastern suppliers, it handles a substantial transcontinental movement of these commodities.
>
> It is insisted * * * that the association does not serve the general public. The association serves not only its 38 members but also that part of the public from which those members purchase their supplies. * * * In our opinion the facts stated warrant the conclusion that the association's service is held out to and performed for the general public. [R. 34-35.]

The Commission has consistently followed this principle. Thus in *Toussaint Contract Carrier Application*, 41 M.C.C. 459, one who transported goods to the customers of two manufacturers, freight paid by consignees, was held to be a common carrier.[17] And in *Phillips Packing Co., Inc., Common Carrier Application*, 260 I.C.C. 297, transportation of goods by a seller to his customers was held to make the seller a common carrier as to f.o.b. factory sales. As Mr. Justice Holmes, speaking for the Court in *Terminal Taxicab Co.* v. *District of Columbia*, 241 U. S. 252, 255, succinctly stated: "The public does not mean everybody all the time." In that case, as here, service was not offered to or utilized by the entire public. A taxi company which furnished cabs at hotels under contracts limiting the services

[17] "Common carrier" as defined in the Motor Carrier Act, Section 203(a), 49 U.S.C. 303(a), includes the same requirement of holding out to the general public embodied in the freight forwarder definition.

to hotel guests only was determined to be providing conveyance for "public use," and therefore to be a common carrier within the terms of a regulatory statute.[18]

Without challenging the above principles, the court below in effect took the position that the activities of the Association are entirely on behalf of its members, and that it does not serve the suppliers of its members. The court found an agency relationship between the Association and its members which made all acts of the Association the acts of its members (R. 55-56).

At the outset it must be observed that there is no supporting finding by the Commission of an agency relationship between the incorporated Association and its members. But assuming that such a relationship might be inferred from the Commission's findings, that relationship would in no way be dispositive of the question whether the Association serves the members' suppliers. This Court held in *United States* v. *Brooklyn Terminal*, 249 U. S. 296, 306-307, that "a common carrier does not cease to

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[18] Accord: *Bowles* v. *Wieter*, 65 F. Supp. 359 (E.D. Ill.) (trucker who picked up milk from farmers only for delivery to certain dairies held common carrier); *Interstate Commerce Commission* v. *Pickard*, 42 F. Supp. 351 (W.D. N.Y.) (trucker who carried the furniture of a single manufacturer held common carrier). Compare: *Re Hirons*, P.U.R. 1929 C. 279; *In Re Pacific Motor Transport Co.*, 38 Calif. R.C.R. 874; *Bennetts* v. *Carpenter*, 111 Colo. 63, 137 P. 2d 780; *Cleveland, Columbus & Cincinnati Highway, Inc.* v. *Public Utilities Commission*, 144 Ohio St. 557, 60 N.E. 2d 166; *Rural Electric Co.* v. *State Board of Equalization*, 57 Wyo. 451, 120 P. 2d 741.

be such merely because the services which it renders to the public are performed as agent for another." Similarly one may act as a freight forwarder for oneself or as agent for someone else.[19]

Agency would be relevant to the present issue only if the act of holding out to provide transportation somehow had a different legal consequence if performed by the members rather than by the Association. But such is not the case. The test of whether the holding out is to the general public is whether a substantial segment of the public is involved. *Terminal Taxicab Co. v. District of Columbia, supra.* Here there has been a freight movement of over 38,000,000 pounds a year from numerous suppliers. Whether it is the Association or its members who are offering to provide transportation, an appreciable part of the forwarding public is served.

The contention that the Association provides transportation for its members rather than their suppliers is simply contrary to the facts of record and found by the Commission. By an f.o.b. destination contract a seller undertakes to deliver the goods to their destination without cost to the buyer. Obviously one who provides transportation of those goods is serving the seller even though he may hap-

[19] If the Association acts as an agent of its members, it does so not in shipping goods for them, but in the conduct of the separate and profitable business of providing freight forwarding services for the suppliers of the members.

pen to be affiliated with the buyer, and the buyer may, as here, make a profit on the transaction (Point I, *supra*). And, as the Commission pointed out, it is the consignor who is injured if there is an overcharge, and who is entitled to sue for reparations (R. 30-31). *Southern Pacific Co.* v. *Darnell-Taenzer Lbr. Co.*, 245 U. S. 531; *Louisville and N. R. R.* v. *Sloss-Sheffield Steel and Iron Co.*, 269 U. S. 217. Moreover, ownership is normally in the consignor, and it is he who usually bears the risk in an f.o.b. destination transaction. See 2 *Williston on Sales* (Rev. Ed. 1948) § 280b.

The pattern of operation here is clear. The Association stands ready, willing and able to provide transportation for any and all suppliers of its members east of Chicago. The members solicit the business, and in most cases the suppliers consent to make use of the Association's facilities. The result is a forwarding business of substantial magnitude. By the test laid down in *Terminal Taxicab Co.* v. *District of Columbia, supra,* it is evident that there has been a holding out to the general public.

The construction of "holding out" here adopted by the Commission was a reasonable one supported by authority. Under the rule (discussed *supra,* pp. 24-26) of *United States* v. *American Trucking Ass'ns.*, 310 U. S. 534, and *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, that reasonable construction should not have been disturbed.

III

The Freight Forwarding Operations of the Association Are Illegal

Section 410(a) of the Act (*supra*, p. 5) explicitly forbids any person to engage in "service subject to this part [IV]" without a permit from the Commission. And Section 402(a) defines the quoted term as:

> any or all of the service in connection with the transportation in interstate commerce which any person undertakes to perform or provide as a freight forwarder, or which such person is authorized or required by or under the authority of this part to perform or provide;

As has been demonstrated in Points I and II, *supra*, the Association has undertaken to perform services as a freight forwarder in commerce, it is not exempt from the regulatory provisions of the Act, and it has never sought a permit from the Commission to operate as a freight forwarder (R. 15). It therefore follows that the Association has been violating the law and that the Commission properly directed it, and the other appellees to the extent that they are parties to its unlawful activities, to discontinue freight forwarding operations. By the same token it is clear that the decree of the court below setting aside the Commission's order cannot be sustained.

CONCLUSION

For the foregoing reasons the decree of the court below should be reversed with directions that the complaint be dismissed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

HERBERT A. BERGSON,
Assistant Attorney General.

J. ROGER WOLLENBERG,
Special Assistant to the Attorney General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

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